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SUPREME COURT, U. S.

No. 776

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

LAWRENCE J. LONG,
Petitioner,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,
a Corporation,
Respondent.

REPLY BRIEF

In Support of Petition for Writ of Certiorari.

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I apologize for the delay in the filing of this Reply Brief. Apparently, the Brief of the Railroad Company was delivered during my absence in delivering some lectures to the College of Law at the University of West Virginia, so that it was April 20 when I first saw its Brief. Ordinarily, no reply would be necessary. However, in this case the Brief of the Railroad Company unfortunately contains some errors which could be misleading to this Court if not corrected.

Upon page 4, reference is made to an affidavit of one John F. Jackson, with reference being made to an Additional Abstract. We were not aware of the filing of any

such Additional Abstract in this Court, and none has been served upon us. However we have searched the record and find that an affidavit of this individual was attached to an early motion by the Railroad Company in the Circuit Court of Champaign County. That motion was argued and denied. Thereafter, the Railroad Company filed an Answer which appears in the Abstract, pages 110-122, and the Jackson affidavit was not refiled. Certain portions of this Answer the plaintiff moved to strike (Abst. 123, 124), and our Notice of Appeal preserved the error of the trial court in failing to strike the objectionable conclusions contained in such Answer.

The defendant railroad took no cross-appeal from the order of the trial court denying its motion to dismiss the action, which was supported by the Jackson affidavit. Under Illinois law, the filing of an answer after a motion has been denied waives any matters contained in the motion. Thus it was stated in W. T. Iverson & Co., Inc. v. Dunham Manufacturing Company, 18 Ill. App. 2d 404 at 425, 152 N. E. 2d 615:

> "• • • the original pleading ceases to be a part of the record, being in effect abandoned or withdrawn, with the result that the subsequent proceedings in the case are to be regarded as based upon the amended pleading, which will not be aided by anything in the prior pleadings." (Citing cases.)

To the same effect is Brandeis Machinery & Supply Co. v. C. A. McNeely General Contracting & Equipment Company, Inc., 18 Ill. App. 2d 396 at 399, 152 N. E. 2d 890, pointing out that such matters are "waived by pleading over".

The Railroad Company, citing Allen v. Meyer, 14 Ill. 2d 284, 152 N. E. 2d 576, argues that where both parties move for a summary judgment, such a judgment should be en-

tered in favor of one or the other. That case is careful to point out (14 Ill. 2d 284 at 292) that this result follows only: "wherein is presented no genuine issue as to any material fact * * *."

It is our feeling that a summary judgment, upon this record, probably could be entered for the plaintiff for the following reasons: Lawrence Long had passed satisfactorily every Holmgren Worsteds test given to him until 1954; in 1954 Dr. Marvel, of Clinton, disqualified him not on the basis of that type of test, but on the basis of an Ishihara test and sent him to Chicago; if the Ishihara test was not a proper test and the defendant Railroad Company had no right to change its method of testing except by compliance with the requirements of the Railway Labor Act, then the defendant had no right to disqualify Lawrence Long on the basis of such test nor to require him to take further examinations nor to require a field test; in all events, the defendant railroad would have no right to impose a condition of an arbitrary field test which was wholly under its supervision and control, and which it waived as to employees less qualified than the plaintiff here. Also, from a purely legal point of view, it is not necessary for an employee who has been wrongfully discharged first to exhaust the remedies of the Railroad Adjustment Board—indeed, such would be an election of remedies which would prevent him from seeking a judicial remedy.

If this Court agrees with our position as to the above matters, then a summary judgment in favor of the plaintiff could be rendered. The one place in which a factual question may have to be determined by a jury is this: Assuming that it becomes material as to whether Lawrence Long failed a Holmgren Worsteds test administered by Dr. Murray, then we contend, and have contended, that such involves a question of fact for the jury. The Rail-

road Company cannot take away from the jury the right to determine the credibility of any witness, by substituting an affidavit attached to a motion for the testimony of that person in open court. In this instance, as we have pointed out earlier, Dr. Murray was an employee of the defendant railroad; he was subject to its supervision and had a definite incentive to give a report favorable to its position; it was undisputed that a defect in color perception is congenital in nature which neither becomes better nor worse as one proceeds through life; Dr. Murray admitted that Lawrence Long had passed successfully over a period of his thirty years of employment nine of such tests and that each of them showed him to be qualified to carry on his work either as an engineer or as a fireman.

If a defendant could, by the simple procedure of filing a motion for summary judgment, and attaching the affidavit of witnesses whose testimony will not stand searching cross-examination or the scrutiny of a jury, deprive an employee of the opportunity of having a jury determine the accuracy of the testimony of such witness, then the judicial remedy has become a mockery. Our counter-affidavits show the weaknesses in the testimony of this witness, and indeed his entire deposition is attached to the original motion of the Railroad Company. Such deposition contains within it the substance for impeachment and discrediting of the Murray affidavit.

Upon page 7 of defendant's Brief, it states:

> "The only real material issue in this case is did or did not the plaintiff have defective color perception" and, we assume, it means a defect sufficiently substantial to render him incapable of performing his duties.

This has never been adjudicated by any legal or proper test. It is analogous, in a criminal case, to saying:

"The only question in this case is whether or not the defendant held up and robbed a national bank."

If the conviction had been obtained by the use of improper and illegal evidence, this Court would reverse a conviction with instructions to disregard the improper evidence and for the issue to be determined in accordance with legal procedures. The plaintiff in this case, as a railroad employee having over thirty years of service, is entitled to an equal protection of his property rights. Again, the determination of Long's ability to perform his duties must be made upon a fair and non-arbitrary basis; it must be according to legal tests which have been recognized between the employer and its employees over the decades of his employment, and upon which tests he was accepted for service and satisfactorily performed his duties, without a single error or omission. It cannot be upon the basis of tests suddenly changed by the unilateral action of the employer, so as to require the imposition of an arbitrary field test which it waived as to employees having poor work records, but which it had refused to waive in the instance of the plaintiff for the sole reason that it wanted to eliminate him as an employee, because of an adverse report which he made while aiding the Interstate Commerce Commission. It will be noted that in no place in this Brief does the Railroad Company deny the truth of this charge.

The principal contention of the defendant is that, under Illinois law, the plaintiff is barred from pursuing his remedy in court until he has exhausted his administrative remedies under the contract. But, at this point, the Railroad Company falls into complete confusion.

To what administrative remedies does the Railroad Company refer? Its discussion is completely ambiguous. The work contract does not make reference to any re-

quirement of proceeding before the Railroad Adjustment Board. In the Payne case, in 13 Ill. App. 2d 105, the express contract of the parties provided for a determination of disputes as follows: (1) appeal to the district representative; (2) appeal to the assistant to the vice-president; (3) appeal to the National Railroad Adjustment Board. In the Koppal case the contract likewise provided a procedure for appeal from a determination by a hearing officer. Our contract does not have any such requirement and does not spell out any remedies within the organization to be exhausted, although the depositions show clearly that Lawrence Long did appeal first to his district superintendent, then to the personnel supervisor, the vice-president, and the president—all without avail. And, under the decisions of this Court, as pointed out in Union Pacific Railroad Company v. Price, 360 U. S. 601, if Lawrence Long had submitted his controversy to the Railroad Adjustment Board, such would have been a binding election of remedies which would have prevented him from submitting his controversy to a court and jury.

Clearly, then, the defendant Railroad Company is in error in believing—as did the Appellate Court of Illinois—that the employee had a duty to seek a remedy first from the Railroad Adjustment Board. The only other administrative remedy to which it could possibly have reference would be the taking of a "field test". We say that Lawrence Long is not required to take a field test in this case because: (1) he was not disqualified by proper medical tests, when the defendant railroad changed from the Holmgren Worsteds test to the Ishihara test, without complying with the statutory provisions; (2) the test as set forth by the Railroad Company is not a fair one, when a one hundred per cent performance is required, the employee is not permitted to have a disinterested expert present, and it is wholly and exclusively within the control of the Railroad Company; (3) this is particularly true

when the field test was waived in the instance of all other employees, even those with imperfect records, and when the Railroad Company does not deny that its objective was to effectuate a malicious discharge of the plaintiff.

As this Court pointed out in Brotherhood of Railroad Trainmen v. Howard, 343 U. S. 768, the courts have a right to grant a judicial remedy to protect any worker or group of workers from discrimination practiced against them. We submit that, even though the Howard case involved the protection of colored workmen against discrimination in favor of white workmen, a capable and honorable employee such as Long is entitled to be free from discrimination practiced against him by the railroad. The employees in the Howard case were not discharged, but were in effect replaced by others so that they were unable to work, and this was held to be equivalent to a discharge.

The defendant Railroad Company has stated that in effect Long has not been discharged, and that the plaintiff himself has not regarded himself as having been discharged. We think this is inaccurate. Lawrence Long offered repeatedly to do anything which was reasonable even to surrendering his rights as a locomotive engineer and to work only as a fireman, if the Railroad Company insisted upon this. But, when the suit was filed, the plaintiff set forth the entire story in his Amended Complaint (Abst. 1-7) alleging that he: "* * * has been deprived of his income from the time of his wrongful disqualification to the present and will be so permanently deprived thereof."

The relief which he asks in his Complaint, and to which the defendant has filed an Answer, is based clearly upon the theory of wrongful discharge. It states:

> "Wherefore, the plaintiff, Lawrence J. Long, prays actual and punitive damages against the defendant,

> Illinois Central Railroad Company, a corporation, in the sum of Two Hundred Fifty Thousand Dollars ($250,000) and costs, and demands trial by jury." (Abst. 7)

With reference to the only other point, the Railroad Company insists that it had the right to change the tests at any time, without giving the notice required by the Railway Labor Act. The Railroad Company is not in a position to insist on the one hand that the various Rules contained contractual provisions binding upon the plaintiff which he was required to fulfil, and yet contend on the other hand that they were not "confractual" provisions at all. We believe it was the contemplation of the Railway Labor Act that the terms and conditions of the employment could not be changed without giving notice and having a hearing in which both management and labor would be represented.

The defendant cites certain decisions of the Railroad Adjustment Board. We do not feel any of those are relevant. There is no question but that any employer has a right to establish certain physical standards for the proper performance of duties by employees. But where it has established the standards, and continued them for decades, it may not suddenly change those standards to disqualify employees properly performing their duties, without a reasonable compliance with the law and without making an equitable and uniform application of those standards. The defendant scarcely can contend solemnly that it has only the interests of the traveling public in mind, or a regard for public safety, when its officers have admitted (Abst. 60-66) that they know that Lawrence Long can perform the duties of his employment, that he has done so with absolute safety for over three decades, that he has never missed a signal, that he had a perfect record, that the acuity of his vision had prevented a possible bad

accident just the year before he was discharged, and that the real reason for wanting to discharge him was that:

> "during the period of time the plaintiff was employed by the Interstate Commerce Commission, certain instances arose in which the plaintiff was required to report the defendant railroad company for rebating and other matters which caused a certain hostility to exist between the officials of the said Railroad Company and the plaintiff, as a result of which the defendant Railroad Company, through its employees and officers, determined wilfully and maliciously to disqualify the plaintiff from service . . ."

To permit the decision of the Illinois Court to stand would be, in effect, to nullify the Moore case. A railroad, simply by failing to use the word "discharge", could prevent a railroad employee from ever securing a judicial remedy. The decision from which an appeal is taken is a misconstruction of the federal law. The result is onerous and unfair. Lawrence Long is entitled to the protection of his property rights; indeed, they are guaranteed to him by the Constitution of the United States. He is entitled to be treated with the same fairness as other employees, and to stand upon the terms of the contract under which he was employed. If this Court agrees with us that the Railroad Company had no right to change these tests without compliance with law, then his discharge was wrongful; he cannot be required to take the arbitrary field test, in any events, which is not required of other employees. And he is entitled to have a jury pass upon the question of damages suffered by him by reason of such wrongful discharge—and, if a question of credibility is presented as to any witness, including Dr. Murray, this also should be determined by a jury.

CONCLUSION.

We respectfully submit that the defendant Railroad Company has not adequately answered the Petition for Writ of Certiorari, and we earnestly pray that such Petition be allowed.

Respectfully submitted,

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